United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

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Court of Appeals of the District of Columbia

OCTOBER TERM, 1929

No. 5101

782

HARRY HARRIS AND LEO ROHAN, APPELLANTS,

vs.

THE UNITED STATES.

APPEAL FROM THE SUPREME COURT OF THE DISTRICT OF COLUMBIA.

FILED NOVEMBER 13, 1929.

PRINTED JANUARY 9, 1930.

Court of Appeals of the District of Columbia

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No. 5101

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vs.

THE UNITED STATES, APPELLEE.

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., DECEMBER 19, 1929.

Court of Appeals of the District of Columbia

No. 5101.

HARRY HARRIS et al., Appellants,

vs.

THE UNITED STATES.

a Supreme Court of the District of Columbia.

Criminal. No. 48007.

UNITED STATES, Plaintiff,

vs.

HARRY HARRIS and LEO ROHAN, Defendant-.

UNITED STATES OF AMERICA,
District of Columbia, ss:

Be it remembered that in the Supreme Court of the District of Columbia, at the City of Washington, in said District, at the times hereinafter mentioned, the following papers were filed and proceedings had in the above-entitled cause, to wit:

1 *Indictment.*

Filed in Open Court March 28, 1929.

Supreme Court of the District of Columbia, Holding a Criminal Term, January Term, A. D. 1929.

DISTRICT OF COLUMBIA, *ss:*

The Grand Jurors of the United States of America, in and for the District of Columbia aforesaid, upon their oath, do present:

That one Harry Harris, and one Leo Rohan, each late of the District of Columbia aforesaid, on, to wit, the seventeenth day of November, 1928, and at the District of Columbia aforesaid, by force and violence, and against resistance, and by putting in fear, and by sudden and stealthy seizure and snatching, feloniously did steal, take and carry away, from and off the person, and from the immediate, actual possession of one Seruch T. Kimble, then and there being, one certain pocket book of the value of three dollars, two hundred and thirty-five dollars in lawful money, of the value of two hundred and thirty-five dollars, of the goods, money, chattels and property of the said Seruch T. Kimble; against the form of the statute in such case made and provided, and against the peace and Government of the said United States.

LEO A. ROVER,
Attorney of the United States in and for the District of Columbia.

(Endorsed:) Criminal. No. 48007. United States vs. Harry Harris, Leo Rohan. Robbery. Witnesses: Seruch T. Kimble, Georgianna Z. Kimble, William J. Debusky, M. P. A True Bill: John H. Lorch, Foreman.

2 Supreme Court of the District of Columbia, Friday, April 5th, A. D. 1929.

The Court resumes its session pursuant to adjournment, Mr. Chief Justice McCoy presiding.

* * * * * * *

Come as well the Attorney of the United States, as the defendant in proper person in custody of the Superintendent of the Washington Asylum and Jail and by his attorneys Messrs. J. H. Burnett and J. A. O'Shea; whereupon the defendant being arraigned upon the indictment the reading whereof he specifically waives, pleads not guilty thereto, and for trial puts himself upon the country and the Attorney of the United States doth the like.

3 Saturday, May 4th, A. D. 1929.

The Court resumes its session pursuant to adjournment, Mr. Chief Justice McCoy presiding.

* * * * * * *

Come as well the Attorney of the United States, as the defendant in proper person, according to his recognizance and by his attorneys Messrs. O'Shea and Burnett; whereupon, the defendant being arraigned upon the indictment the reading whereof he specifically waives, pleads not guilty thereto, and for trial puts himself upon the country and the attorney of the United States doth the like.

Wednesday, May 22nd, A. D. 1929.

The Court resumes its session pursuant to adjournment, Mr. Chief Justice McCoy, presiding.

* * * * * * *

Come as well the Attorney of the United States, as the defendants in proper person, the defendant Harris in custody of the Superintendent of the Washington Asylum and Jail, the defendant Rohan according to his recognizance and by their attorneys Messrs. O'Shea and Burnett; and thereupon comes a jury of good and lawful persons of the District of Columbia, to-wit: E. Ray Keene, Sampson Manning, John W. Mudd, Harry J. Magner, Wm. H. Herring, Kenneth J. Winfield, Irvin Fanney, Miss Mary Tate, Priscilla Wilkes, Mrs. Emma McWilliams, Clem E. Osborne, James H. Thomas, who, being sworn to well and truly try the issue joined here, upon their oath say that each defendant is guilty in manner and form as
4 charged in the indictment; and thereupon upon motion of the defendants by their attorneys, the said jury are polled and each and every member thereof upon their oath say that each defendant is guilty; whereupon the defendant Harris is remanded to the Washington Asylum and Jail and the defendant Rohan is committed to said Asylum and Jail.

Motion for a New Trial.

Filed May 27, 1929.

* * * * * * *

Come now the defendants, Leo J. Rohan and Harry Harris, by their attorney, James A. O'Shea and move the Court

to grant a new trial in the above entitled cause and for reasons therefore show to the Court:

1. That the verdict was contrary to the evidence.
2. That the verdict was contrary to the weight of the evidence.
3. That the verdict was contrary to the law as given to the jury by the Court:
4. That the Court erred in instructing the jury.
5. That the Court erred in refusing to admit evidence contrary to law.
6. That the Court erred in admitting evidence contrary to law.
7. That new and material facts have come to light since the trial.
8. That the jury was improperly constituted.
9. That the jury was not drawn according to law.

JAMES A. O'SHEA,
Attorney for Defendants.

5 Leo A. Rover, Esquire,
United States District Attorney,
Court House, Washington, D. C.

Please take notice that the foregoing motion for a new trial will be called to the attention of the Justice presiding in Criminal Court No. — on Friday the — day of May, A. D. 1929, at ten (10) o'clock, A. M. or as soon thereafter as counsel may be heard.

JAMES A. O'SHEA,
Attorney for Defendants.

Service acknowledged this 27th day of May, A. D. 1929.
LEO A. ROVER,
K.,
U. S. District Attorney.

Supreme Court of the District of Columbia.

Saturday, June 15", A. D. 1929.

The Court resumes its session pursuant to adjournment, Mr. Chief Justice McCoy, presiding.

* * * * * * *

Come as well the Attorney of the United States, as the defendants herein by their attorney J. A. O'Shea, Esquire; and thereupon the defendants' motion for a new trial coming on to be heard, after argument by the counsel is by the Court overruled, to which action of the Court the defendants by their attorney pray an exception which is noted.

6 Supreme Court of the District of Columbia.

Monday, July 8", A. D. 1929.

The Court resumes its session pursuant to adjournment, Mr. Chief Justice McCoy presiding.

* * * * * * *

Come as well the Attorney of the United States, as the defendants in proper person, each in custody of the Superintendent of the Washington Asylum and Jail, and by their attorney James A. O'Shea, Esquire; and thereupon it is demanded of each defendant what further he has to say why the sentence of the law should not be pronounced against him and he says nothing except as he has already said; whereupon it is considered by the Court that for his said offense, each of the said defendants be taken by the Superintendent aforesaid, to the Asylum and Jail aforesaid, whence he came, thence to the Penitentiary as designated by the Attorney General of the United States, the defendant Harris there to be imprisoned for the period of Ten (10) Years to take effect from and including the date of arrival of said defendant at said Penitentiary, and the defendant Rohan there to be imprisoned for the period of Seven (7) Years and Six (6) Months, to take effect from and including the date of arrival of said defendant at said Penitentiary; and thereupon each defendant by his

7 attorney notes an appeal to the Court of Appeals of the District of Columbia from the judgment of the Court in this case; whereupon the Court fixes the amount of bond for costs on appeal at One Hundred Dollars or Fifty ($50) in cash.

Memoranda.

July 30, 1929.—Cost Bond on Appeal Approved and filed.
Bill of Exceptions filed.

Supreme Court of the District of Columbia.

Friday, October 4", A. D., 1929.

The Court resumes its session pursuant to adjournment, Mr. Chief Justice McCoy, presiding.

* * * * * * *

Now comes here each defendant by his attorney James A. 'O'Shea, Esquire, and prays the Court to sign, and make a part of the record his Bill of Exceptions taken during the trial of the case and filed with the Court on the 30th day of July, 1929, which is accordingly done.

8 *Assignments of Error.*

Filed October 7, 1929.

* * * * * * *

Now come the defendants, Leo Rohan and Harry Harris, by their attorneys, James A. O'Shea and John H. Burnett, and assign for review to the Court of Appeals of the District of Columbia, on appeal in the above entitled cause, the following errors committed by the trial court:

1. In refusing to allow counsel to interrogate the witness Messer as to his having a contradictory statement in Police Court.

2. In refusing to allow counsel to interrogate the witness Messer if in the Police Court when asked "Did they say where they had been" he answered "No," and not they "didn't remember" as he testified in the present trial. The Court stating it was not a contradiction.

3. In overruling defendants' motion for a directed verdict at the close of the Government's case.

4. In refusing prayer one of the defendants.

5. In refusing prayer four of the defendants "except as charged."

6. In refusing prayer six of the defendants "except as charged."

7. In refusing prayer seven of the defendants "except as charged."

8. In amending prayer eight of the defendants.

9. In refusing prayer nine of the defendants "except as charged."

10. In overruling the motion for a new trial.

JAMES A. O'SHEA,
J. H. BURNETT,
Attorneys for Defendants.

9 Service of copy acknowledged this — day of October, A. D. 1929.

LEO. A. ROVER,
By W. H. C.,
United States Attorney in and for the District of Columbia.

Designation of Record.

Filed October 7, 1929.

* * * * * * *

The Clerk will please make up the record for the Court of Appeals to consist of the following:

1. The Indictment.
2. The Plea.
3. The Verdict of the Jury.
4. Motion for a New Trial.
5. Order overruling Motion for New Trial and Exception thereto.
6. Appeal noted.
7. Cost Bond.
8. Bill of Exceptions.
9. Assignments of Error.
10. This Designation of Record.

JAMES A. O'SHEA,
J. H. BURNETT,
Attorneys for Defendants.

Service of copy acknowledged this — day of October, A. D. 1929.

LEO A. ROVER,
By W. H. C.,
United States Attorney in and for the District of Columbia.

10 Supreme Court of the District of Columbia.

UNITED STATES OF AMERICA,
District of Columbia, ss:

I, Frank E. Cunningham, Clerk of the Supreme Court of the District of Columbia, hereby certify the foregoing pages, numbered from 1 to 9, both inclusive, to be a true and correct transcript of the record, according to directions of counsel herein filed, copy of which is made part of this transcript, in Criminal Cause No. 48007, wherein United States is plaintiff and Harry Harris and Leo Rohan are Defendants, as the same remains upon the files and of record in said Court.

In testimony whereof I hereunto subscribed my name and affix the seal of said Court, at the City of Washington, in said District, this 30th day of October, 1929.

[Seal Supreme Court of the District of Columbia.]

FRANK E. CUNNINGHAM,
Clerk.

11 In the Supreme Court of the District of Columbia,
Holding a Criminal Term.

Criminal. Number 48007.

UNITED STATES

vs.

HARRY HARRIS and LEO ROHAN, Defendants.

Defendants' Bill of Exceptions.

This cause came on for trial before the Honorable Walter I. McCoy, Chief Justice of the Supreme Court of the District of Columbia, and a jury, on May 22d, 1929, the United States being represented by William H. Collins and James Francis Hughes, and the defendant by James A. O'Shea and John H. Burnett, and the following proceedings were had:

That the Government, to maintain the issues on its part joined, called one **Seruch T. Kimble**, who testified substantially as follows:

That he was a teacher at Central High School; that on November 17th last he had occasion to go to the baseball park located at 7th and Florida Avenue, and was accompanied by his daughter and a girl friend; that it was about quarter of two and he had no ticket to the Georgetown-West Virginia Game; that at the ticket office he found the price was higher than in preceding games and decided to go into the bleachers and saw there were no ladies going that way so he came back and bought three tickets and joined the crowd going into the gate; that he had $5.00 in his vest pocket; that he went to the ticket window took out his pocketbook from his left side pocket bought the tickets and replaced the pocketbook and rejoined the girls at the edge of the crowd going into the park and went in; that he took a one dollar bill from his pocketbook and added it to the five from his vest pocket making six
12 dollars; that on that occasion he had approximately $235.00 of his money in the pocketbook; that after receiving the tickets he put the pocketbook back in the same pocket; that his daughter was standing at the edge of the crowd some thirty or forty feet away where he rejoined her; that he proceeded through the main entrance through those gates there; that his daughter and her companion were thirty or forty feet from the iron gates at the point he joined her; that the crowd numbered 300 or 400 people and as they proceeded the whistle blew for the kick off and he kept his hand on his left pocket and carried his overcoat over his right arm; that he doesn't know exactly when he removed his hand from his pocket; that probably half way through the crowd someone tapped him on the right shoulder sufficiently noticeable for him to turn around and he didn't see anybody that he recognized; that he had seen one of these men here for some time before that, the one on the right; he first saw him a third of the way through the crowd until within ten feet of the gate; he missed his pocketbook when he got in the park; that his daughter was following him about two or three people removed and sometimes closer than that following the crowd with her girl companion.

Cross-examination:

He had the overcoat on his right arm and the tickets in his right hand; that he does not recall distinctly taking his

hand out of his pocket; that he would not say the last time he had his pocketbook was when he was at the ticket window buying his tickets; that there were people behind him in line when he came up through those alleyways to buy his tickets; that from there to the main entrance it was about forty feet and he made his way through the crowd for forty feet; that after he got into the park his seats were a hundred feet maybe one hundred and fifty feet from the main entrance; that he couldn't tell where the seats were; that when he turned around after being tapped on the shoulder he did not recognize anybody; that he
13 wouldn't say that in the Police Court he testified that before he got to the entrance he last knew he had his pocketbook at the ticket booth; that before he got to the entrance he last knew he had his pocketbook when he was at least half way through the crowd; that he doesn't know if he testified in the Police Court that before he got to the entrance he last knew he had his pocketbook at the ticket booth; that the ticket booth was probably eighty feet from the entrance; that he first noticed Mr. Rohan one third of the way through the crowd; that his daughter was following alongside of him; that he doesn't know what is meant by paying any more attention to Rohan any more than anyone else but he crowded his way through the best he could the same as the rest were doing and Rohan was doing and he walked closer to witness than anyone else in the crowd; that he doesn't know if he testified in the following manner in the Police Court:

"And all this time was this man behind you (indicating Rohan)?" A. For at least I should say—not behind me at all. I didn't see anybody behind me. For half the distance, perhaps, he was alongside of me, and finally gave way, and I went in. I don't know where he went. I didn't pay any attention to him any more than anybody else."

that his dress was a steel gray suit, felt hat, carrying a light overcoat; that he wouldn't say he was strictly color blind but he confuses some colors; that he didn't see the other defendant there at all.

That then and thereupon the Government, to further maintain the issues on its part joined, called one **Georgianna Zebley Kimble**, who testified substantially as follows:

That she is the daughter of the witness who preceded her on the stand; that on November 17th of last year she
14 accompanied her father to the American League Baseball Park; that she was standing with her girl friend by one of the iron posts when her father went to the ticket window; that he rejoined them and they started up towards the gate; that as they started off witness and her girl friend were about ten feet behind her father; that she saw both of the defendants; that she was trying to stay directly behind her father and not lose him in the crowd but was unable to do so; that Harris was right behind her father and she couldn't edge her way to get directly behind him; that Harris was closer to her father than the other people around them; that he was so close that there wasn't the least bit of room between; he was closer than anybody else in the crowd and this prevented her getting in the position she wanted in following her father in; that Harris tapped her father on the shoulder and he turned around; that the other defendant Rohan at that time was on the left hand side of her father; that when they got about five feet from the gate Harris moved aside and Rohan did too and let us go into the park without them coming with us; there had been a general shove at that time and when the shove subsided he tapped my father on the right shoulder; that the other defendant was immediately on the rear; that on the occasion when the tap was given on the shoulder by Harris the other defendant was still at the left of her father.

Cross-examination:

That she didn't see Rohan take the pocketbook; that the pocketbook was not missed until her father got around to the place where the seats were one hundred and some odd feet from the entrance; she doesn't know but would judge her father had his coat on his left arm; she is not prepared to say that these men did not eventually go through the gate after witness and her father went in; that Miss Emily Nichols, the girl with her, was holding on to her hand; that there was a good deal of pushing and shoving there.

15 That then and thereupon the Government, to further maintain the issues on its part joined, called one **William Messer**, who testified substantially as follows:

That he is a member of the Metropolitan Police Department, a detective sergeant attached to headquarters; that he did not arrest the two defendants; that he had a conversation with them and asked them if they were at the football games Saturday the 17th of November and they said they weren't; that he asked them where they were and they didn't remember just what place and where they were stopping at, but they weren't sure which hotel, the Continental, the Commodore of Lincoln; that they said they had come to town together with their wives; that on this occasion when he talked to them they said they didn't remember where they were on that afternoon but were sure they were not at the ball park.

Cross-examination:

That this conversation was on the Friday evening a week, minus one day, from the time he had the report of Mr. Kimble; it may have been the 23rd of November, that is when it was on a Friday; both defendants were together when he talked to them; that they said they didn't remember where they were on this day but not at the baseball park. That then and there the following occur-ed:

"Q. Now, when you were asked in the police court the following question: 'Did they say where they had been?' you said: 'No.' You didn't say they didn't remember in that conversation, did you?

The Court: That is no contradiction.

Mr. O'Shea: May I take an exception?

The Court: Yes. I say to the jury it is not a contradiction. I repeat to the jury it is not a contradiction. You may take another exception.

Mr. O'Shea: One is good enough.

16 The Court: I repeat it, and say that is taking time unnecessarily. I think we ought to move more rapidly than we do."

That then and thereupon the Government rested its case.

That then and thereupon the Court overruled a motion for a directed verdict on behalf of the defendants on the ground there must be something more than the mere pushing to constitute the crime and noted an exception thereto.

That then and thereupon the following prayers were offered on behalf of the defendants:

Number One.

The jury are instructed that upon all the evidence they should find a verdict of not guilty.

Refused. Exception.
W. I. McC., *C. J.*

Number Two.

The jury are instructed that the only object and purpose of the indictment in a criminal case is to inform the defendants of the nature and cause of the accusation against him; that it does not amount to evidence against the defendants in any degree whatever, and the only purpose for which it can be considered by the jury is to determine the charge of which the defendants are accused.

Granted.
W. I. McC., *C. J.*

Number Three.

The jury are instructed that a mere preponderance of evidence in favor of the prosecution is not sufficient to convict the defendants, but before they can be convicted the jury must be convinced of their guilty beyond a reasonable beyond a reasonable doubt; and if, after a consideration of all the evidence in the case, it can reasonably be
17 reconsiled upon the hypothesis of the innocence of the defendants then it is their duty to do so and render a verdict of not guilty.

Granted.
W. I. McC., *C. J.*

Number Four.

The jury are instructed that the presumption is, to begin with, that the defendants are innocent of the offense alleged in the indictment. The whole burden of proof rests upon

the Government, and the defendants could have sat mut- and said nothing and produced no witnesses. There is that presumption with which you begin the case and that presumption stays with the defendants throughout the case, and is a fact to be weighed by you in connection with all the evidence in the case, and after weighing the presumption of innocence that exists in favor of the defendants, that unless the Government has proved beyond a reasonable doubt each and every material fact essential and necessary to constitute the offense alleged in the indictment the defendant is to be considered by you innocent and your verdict should be not guilty.

Refused except as charged. Exception.
W. I. McC., *C. J.*

Number Five.

The law presumes the defendants innocent until proven guilty beyond a reasonable doubt, and if you can reconcile the evidence before you upon any reasonable hypothesis consistent with the defendants' innocence you should do so, and in that case find them not guilty.

Granted.
W. I. McC., *C. J.*

Number Six.

The jury are instructed that in order to convict
18 the defendants upon circumstantial evidence it is necessary not only to prove that all the circumstances concur to show that they committed the crime charged, but that those circumstances are inconsistent with any other reasonable conclusion than that of their guilt.

It is not sufficient to entitle*d* the prosecution to a conviction that the circumstances coincide with, account for, and render probable the hypothesis of guilt sought to be established by the prosecution, but those circumstances must exclude, to a moral certainty, every other hypothesis but the single one of the guilt of the defendants, or the jury must find the defendants not guilty.

Refused except as charged. Exception.
W. I. McC., *C. J.*

Number Seven.

The jury are instructed that in this case the evidence of facts and circumstances must be such as to exclude, to a moral certainty, every hypothesis but that of guilt of the offense imputed or, in other words, the facts and circumstances must not only all be consistent with and point to the guilt of the accused, but they must be inconsistent with his innocence; and unless the facts and circumstances in evidence are sufficient to satisfy your minds and consciences beyond a reasonable doubt that the defendants are guilty, they you should find them not guilty.

Refused except as charged. Exception.
W. I. McC., *C. J.*

Number Eight.

The jury are instructed that it is a rule of law that to warrant a conviction of a criminal offense, upon circumstantial evidence alone, such a state of facts and circumstances must be shown as that they are all consistent with the guilt of the parties charged, and such that they can not upon any reasonable theory be true and the parties
19 charged be innocent.

Granted as amended.
W. I. McC., *C. J.*

Number Nine.

The jury are instructed that before they can convict the defendants in this case it must appear from the evidence beyond a reasonable doubt that the defendants and not somebody else committed the offense charged in the indictment. It is not sufficient that the evidence shows the defendants or somebody else committed the crime, nor that the probabilities are that the defendants and not somebody else committed the crime, unless those probabilities are so strong as to remove all reasonable doubt as to whether the defendants or somebody else committed the offense.

Refused except as charged. Exception.
W. I. McC., *C. J.*

That then and thereupon the defendant noted an exception to the refusal of the Court to grant each of the prayers so refused as aforesaid, and an exception was duly allowed and noted upon the minutes of the Court.

That then and thereupon the Court charged the Jury as follows:

"Ladies and Gentlemen, the indictment in this case is drawn up and signed by the District Attorney and Grand Jury formally, only for the purpose of informing you, likewise informing the Court, and likewise informing the defendant, of the crime with which he is charged, of course, it is not evidence of the commission of that crime.

You must presume these defendants to be innocent until you reach the conclusion—if you do reach the conclusion, after considering all the evidence, beyond a reasonable doubt—that they are guilty; and if you so come to that conclusion, of course, as I have so often told you, the presumption disappears. It is not sufficient that the guilty shall be proved by a mere preponderance of the evidence, but, as I have said, it must be proved beyond a reasonable doubt, and if, after consideration of all the evidence in the case, it can reasonably *re* reconciled with the hypothesis of innocence of the defendants, then it is your duty to do so and to render a verdict of not guilty.

You are instructed that in order to convict the defendants upon circumstantial evidence it is necessary not only to prove that all circumstances concurred, and to show that they committed the crime charged, but that those circumstances are inconsistent with any other reasonable conclusion than that of their guilt.

You are instructed that to warrant a conviction of a criminal offense upon circumstantial evidence alone, such a state of facts and circumstances must be shown as that they are all consistent with the guilt of the parties charged, and such that they cannot, upon any reasonable theory, be true and the parties charged be innocent. Those charges in regard to a case in which the evidence is circumstantial are the law.

But circumstantial evidence otherwise is no different from any other evidence. It is just as good as any other evidence. The only question on circumstantial evidence in

the case, is, Are the jury satisfied about it, beyond a reasonable doubt, that the defendants are guilty? If they are, that is enough, and it is no more, except as I have said to you, that though all the evidence in the case were what is known as direct evidence.

These defendants are charged with the crime of robbery, and the indictment follows the language of the statute, saying 'by force and violence, and against resistance, and by putting in fear, and by sudden and stealthy seizure and snatching.' The evidence in this case is all directed toward a sudden and stealthy seizure and snatching. Each of these things is said to have existed—that is, the force and violence, against resistance, putting in fear, and by sudden and stealthy seizure and snatching. It is sufficient to prove any one of those methods, provided any one of them
21 was used for the perpetration of the taking from Mr. Kimball of his pocketbook. The charge, as I think I may have told you, is in the conjunctive, because any one of them is good, and, any one of them being proved, that would be sufficient.

That is all.

Mr. O'Shea: We want to renew our exceptions, of course, if your Honor please.

The Court: I have noted all the exceptions."

All of which exceptions, as stated in the foregoing bill of exceptions, were duly noted by the Court at the time the same were severally taken, and said exceptions are signed as the several exceptions taken at the trial, this 4th day of October, A. D. 1929, nunc pro tunc.

WALTER I. McCOY,
Chief Justice.

I consent.
W. H. COLLINS.

22 William H. Collins, Esq.,
Assistant U. S. Attorney,
Washington, D. C.:

Please take notice that on the 28th day of August, A. D. 1929, at ten (10) o'clock A. M., or as soon thereafter as

counsel may be heard, the proposed Bill of Exceptions attached to this notice will be submitted to the Court to be settled.

JAMES A. O'SHEA,
JOHN H. BURNETT,
Attorneys for Defendants.

Service of copy acknowledged this 30th day of July, A. D. 1929.

WILLIAM H. COLLINS,
Assistant U. S. Attorney.

23 [Endorsed:] Criminal. Number 48007. United States vs. Harry Harris and Leo Rohan, defendants. Defendants' bill of exceptions. Clerk please file. James A. O'Shea, John H. Burnett, 402 Sixth St. N. W., attorneys for defendants.

Endorsed on cover: District of Columbia Supreme Court. No. 5101. Harry Harris et al., appellants, vs. The United States. Court of Appeals, District of Columbia. Filed Nov. 13, 1929. Henry W. Hodges, Clerk.

FOR MR. CHIEF JUSTICE MARTIN.

COURT OF APPEALS,
DISTRICT OF COLUMBIA
FILED

MAR 31 1930

Henry W. Hodges
CLERK.

No. 5101

In the Court of Appeals of the District of Columbia

JANUARY TERM, 1930

HARRY HARRIS AND LEO ROHAN, APPELLANTS

v.

UNITED STATES, APPELLEE

BRIEF FOR APPELLEE

LEO. A. ROVER,
United States Attorney,
WILLIAM H. COLLINS,
Assistant United States Attorney,
Attorneys for Appellee.

Robbee v US
271 U S 494

In the Court of Appeals of the District of Columbia

JANUARY TERM, 1930

No. 5101

HARRY HARRIS AND LEO ROHAN, APPELLANTS

v.

UNITED STATES, APPELLEE

BRIEF OF APPELLEE

STATEMENT OF FACTS

The appellants in this cause were convicted under an indictment charging the offense of robbery. The type of robbery as disclosed by the evidence was that of stealthy seizure and snatching, or, as familiarly termed, pickpocketing.

The testimony proved that on November 17, 1928, the day of the Georgetown-West Virginia football game, one S. T. Kimble and his daughter went to the American League Park to witness the football game; that Mr. Kimble proceeded to one of the ticket-office windows to purchase tickets, and when paying for same it became necessary for him to take out his pocketbook, which contained approxi-

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mately $235.00; that after purchasing the tickets he replaced his purse and rejoined his daughter and her girl friend, and then proceeded to the gate with his daughter and her friend following approximately ten feet to his rear; that as he neared the gate in the midst of a general rush of the crowd, one of the appellants tapped him on the right shoulder, causing him to turn partially around; that at that time the other appellant was immediately to witness' left; that shortly after the tap on the shoulder both appellants stepped back and permitted Mr. Kimble and the two girls to go into the park but didn't go in themselves; that shortly following this incident Mr. Kimble found his pocketbook was gone.

The appellants were later arrested and identified, and when questioned by the police stated that they had come to town together with their wives, and stated also they didn't know where they were on the afternoon of November 17th, and didn't remember at what hotel they stopped, but said they were not at the baseball park that afternoon.

There was no evidence offered by the defense in the trial.

ARGUMENT

Assignments one and two

These assignments are so ridiculous that they must fall of their own weight.

The basis for the attempt at impeachment was that at the trial the officer testified that subsequent

to their arrest the appellants stated they didn't remember where they were on the afternoon in question, whereas it was claimed that at the preliminary hearing the officer, in answer to the question, "Did they say where they had been," replied, "No."

There is not a case cited by appellants in brief that is in any wise inconsistent with the ruling by the trial justice in this cause. All of these cases are predicated on what amounts to a contradiction or inconsistency, and it is manifest from a reading of the above question and answer that they are in no wise contradictory or inconsistent with the testimony given by the officer at the trial.

Assignments three and four

A reading of these two assignments and the argument thereunder demonstrates them to be as frivolous and ridiculous as the first two assignments, and the cases cited have absolutely no place under the assignments because they have no applicability to the facts in this case.

The indictment charging robbery in different ways has been proved by this court in *Turner* v. *United States,* 57 Appeals D. C. 39. The only burden on the Government was to prove the robbery as having occurred in one of the ways described in the indictment. The proof showed the sudden, stealthy seizure and snatching of Mr. Kimble's purse by the one appellant, with the other appellant aiding, abetting, and assisting.

There is a manifest effort in appellants' brief to forget the evidence. This is not a case of an attempt to prove the commission of a crime by *mere presence* or solely on a confession. A review of the evidence discloses the following:

1. The removal by Mr. Kimble of his purse at ticket office in full view of interested parties.

2. Positive identification of one of the appellants by Mr. Kimble, the victim.

3. Positive identification of both defendants by Miss Kimble.

4. Undisputed testimony that both appellants followed close behind Mr. Kimble as he proceeded to the gate, one at the right and the other at the left.

5. Positive testimony that one of the appellant's tapped Mr. Kimble on the right shoulder, causing him to turn around to the right.

6. Positive testimony that at that time the other appellant was at Mr. Kimble's immediate left.

7. Positive testimony that after the *push and take act,* the two appellants lost interest about going in the gate.

8. Positive testimony that shortly thereafter Mr. Kimble realized his purse containing $235 was gone.

9. Positive testimony that after arrest, two *out-of-town gentlemen* stated that they were in Washington that day, but *did not remember where or at what hotel they stayed.*

It is therefore apparent that there was an abundance of evidence clearly and convincingly disclosing the typical pickpocketing by these two appellants, and presented not only circumstantial but also direct evidence.

The weight of that evidence was for the jury, and this court in *Cady* v. *United States,* 54 Appeals D. C., 11, and all courts generally, have held that the court will not attempt to determine the weight of the evidence so long as there is some evidence upon which the jury could predicate a verdict. In this case, as already suggested, there was an abundance of evidence.

For further authorities on this subject see:

Burton v. *U. S.,* 202 U. S. 344.
Hoskins v. *U. S.,* 4 Fed. (2d) 804.
Talmadge v. *U. S.,* 4 Fed. (2d) 378.
Israel v. *U. S.,* 3 Fed. (2d) 743.
Westfall et al. v. *U. S.,* 2 Fed. (2d) 973.

Assignment five

A reading of prayer No. 4 indicates that the court denied this prayer because it was a manifest attempt to combine in one prayer more than one suggestion of law in a manner that would necessarily be misleading and confusing to the jury. The Record, pages 16 and 17, shows that the court charged on the principles aimed at in this prayer.

Agnew v. *U. S.,* 165 U. S. 36, 51–52.
Blanton v. *U. S.,* 213 Fed. 320.
Kreiner v. *U. S.,* 11 Fed. (2d) 722.

The court did not refuse to charge that it was not incumbent upon the appellants to take the stand in their own behalf or to offer evidence. What the court did refuse was a prayer which had that suggestion, along with several others contained within it.

It is a well-settled practice in this jurisdiction, and also in many others, for the trial justice to refrain from telling the jury the principle of law covering the subject matter of defendant's failure to testify or offer testimony unless specifically requested by the defense, for the reason that a great many practitioners do not want that principle charged.

This court will immediately recognize this prayer as what is familiarly referred to as a *trick prayer,* and, furthermore, it is well-settled law that if there is any complaint as to the charge given, the court's attention should be called to it at that time, so that corrections, if proper, may be made then.

In this case, as the Record proves at page 17, no exception, either general or special, was taken to the charge of the court.

In *Silkworth* v. *U. S.,* 10 Fed. (2d) 721, 271 U. S. 664, the court in its opinion states as follows:

> Where the Court delivers a charge, he is entitled to have his attention specifically called to some error in his colloquial charge, or some specific thing he has omitted therefrom. He is not obliged to go through all

the requests and see if they have been covered in the main charge.

See also:

D. C. v. *Deitrich,* 23 Appeals D. C. 577.
Carmody v. *Capital Traction Company,* 43 Appeals D. C. 245.
Allen v. *U. S.,* 13 Fed. (2d) 122.
Strauss v. *U. S.,* 13 Fed. (2d) 122.

Assignments six and nine

Appellee deems no argument necessary on a refusal by trial justice to grant prayers 6 and 7, because the law on the subject was amply covered in prayers 5 and 8, which were granted and in the general charge of the court.

It is therefore apparent that no error was committed in the trial of this cause, and the judgment thereunder should be affirmed.

Respectfully submitted.

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